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NTSB Order No. EA-4139

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of April, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. LIVIO L. BOGNUDA, Respondent.	)	Docket SE-12492

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on September 10, 1992, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator suspending respondent's private pilot certificate for 120 days for violations of 14 C.F.R. 39.3, 91.7(a), 91.203(a)(1), 91.409(a)(1), and 91.13(a) of

[1]The initial decision, an excerpt from the hearing transcript, is attached.

the Federal Aviation Regulations (FARs).[2] We deny the appeal.[3]

[2]§ 39.3 reads:

> No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.

§ 91.7(a) reads:

> No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.203(a)(1) reads, as pertinent:

> (a) Except as provided in § 91.715, no person may operate a civil aircraft unless it has within it the following:
>
> (1) An appropriate and current airworthiness certificate. . . .

§ 91.409(a)(1) reads:

> (a) Except as provided in paragraph (c) of this section, no person may operate an aircraft unless, within the preceding 12 calendar months, it has had -
>
> (1) An annual inspection in accordance with part 43 of this chapter and has been approved for return to service by a person authorized by § 43.7 of this chapter[.]

§ 91.13(a) reads:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

(No separate proof of carelessness or recklessness is required. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at footnote 17, and cases cited there (violation of an operational FAR regulation is sufficient to support a "residual" or "derivative" carelessness finding).)

[3]Respondent has moved to dismiss the Administrator's complaint on the ground that his constitutional right to due process has been violated. Respondent argues that it is improper for the same attorney to represent the FAA and the Board. The motion is denied.

Respondent misapprehends the relationship between the FAA

(..continued)
and the Board. For the purposes of judicial review by the Federal circuit courts of appeal, the Board's decision is akin to that of a Federal district court. Thus, the Board does not defend its decision, FAA counsel (representing itself as the true respondent in the judicial proceeding) performs this function. Neither the FAA nor its attorneys, however, is involved or participates in any way in the internal decisionmaking that produces the law judge's decision or the Board's decision on appeal.

Respondent owned a Socata Rallye on which an annual inspection was performed in early 1991. The aircraft logbook contained the following entry, dated February 6, 1991:

> I certify that this airplane has been inspected in accordance with an annual inspection and a list of discrepancies and unairworthy items dated 6 Feb 91 has been provided for the airplane owner and operator. The list includes: cowl centering pins worn beyond limits specified in A.D. [Airworthiness Directive, AD] 76-11-2. Right tire bald. Transponder loose. Numerous unsupervised work done to aircraft not in accordance with FAR 43 Appendix A including Loran installation and related systems. See engine records for further list. -End-

Exhibit C-3. The engine logbook contained a similar entry, referencing discrepancies of "oil leak and unsupervised work not done in accordance with FAR 43 Appendix A." Exhibit C-2. Thus, based on these entries, the aircraft had no current annual inspection and was not considered airworthy by the certifying mechanic.[4]

According to the testimony of the two Valley Air Service mechanics who performed the annual inspection, respondent (as the owner and operator) was told of the discrepancies and shown a checklist used during the inspection. All the discrepancies were

[4]With regard to § 91.7(a), we note our disagreement with FAA counsel's suggestion at the hearing that the mechanic's certification of unairworthiness was, standing alone, proof of unairworthiness. Of course, operating an aircraft when it has been certified unairworthy is a risky proposition and not one we would encourage, but the rules do not support this reading, as they do not provide that an aircraft is unairworthy if it is certified so. Whether the aircraft is unairworthy is a question of fact, and the mechanic's certification may be proven to be in error. Operating an aircraft when it has no current airworthiness certificate and no current annual inspection violates other rules: §§ 91.203(a)(1) and 91.409(a)(1).

noted on that list.[5] The checklist (Exhibit C-4) indicated the following defects that the Administrator's witnesses testified produced an unairworthy and unsafe aircraft:

1. Firewall, cowling - will not pass A.D.
2. Mics. [sic] comments - leaking oil
3. Brakes - right brake linings[6]
4. Tires, wheels - RT tire bald
5. Master cylinders - poor full of rust
6. Instruments, panel - Transponder loose
7. Underfloor structure - N 337 on Loran
8. Airworthiness certification - unairworthy.[7]

With the exception of item 1 (see discussion infra), respondent does not rebut the testimony that these defects resulted in an unairworthy aircraft.

The mechanic who allegedly discussed the aircraft's condition with respondent testified that, although he might not have used the term unairworthy (he could not remember), he explained to respondent before February 6 why he could not sign off on the aircraft. This mechanic also testified that, although there might have been some confusion in that the logbooks were

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[5]Neither mechanic could remember definitively whether respondent was given a copy of the checklist, but one testified that he believed he had done so and it was the practice to do so. Tr. at 111.

[6]There was some disagreement on the record whether this item was repaired before the February 6 certification. We need not rely on it in reaching our decision.

[7]A strobe light was also out, but this was not considered an airworthiness item.

not delivered to respondent for approximately 1 month after the above entries were made and, thus, respondent might not have seen the unairworthiness entry, the mechanic believed that respondent knew the aircraft had been determined not to be airworthy. Tr. at 107.

Respondent admits the allegation in the Administrator's complaint that, between February 6, 1991 and April 8, 1991, he flew the aircraft on 12 occasions.[8] Respondent's pilot log indicates that he flew the aircraft both before and after he had regained possession of the logbooks (which, as earlier noted, contained the unairworthiness entries).

Respondent's version of events was considerably different. He testified that, when he picked up the aircraft from Valley Air Service, he was told the annual was complete, and he interpreted this to mean the aircraft was airworthy. Respondent denied ever being told of any discrepancies, and denied being provided with any sort of list identifying discrepancies. He testified that Valley for some reason could not locate the logbooks and because of that he was told that, if he was subject to a ramp inspection (by the FAA), Valley should be contacted. His roommate confirmed this testimony. Respondent testified that, when he obtained the logbooks on March 16, 1991, he was told about the bad write-up, but did not look at either logbook until April, when certain work

[8]The complaint thus suggests that by April 8 the aircraft had been made airworthy. The contrary was, however, indicated in the record by the absence of satisfactory entries on all the discrepancy items. See Tr. at 160-162.

related to compliance with the AD was done. Respondent explained his belief that the continuing work on the aircraft after February 6, work that coincided with the items on the discrepancy list, did not implicate the aircraft's airworthiness.

Respondent established, through his testimony and that of a mechanic who worked on the aircraft after Valley Air Service, that Valley had misunderstood AD 76-11-2, and that when the cowling pins were replaced on April 8, 1991 (see Exhibit C-3), the wrong pins were replaced. Respondent concluded, from this evidence, that the aircraft was not out of compliance with the AD at the time of the annual inspection and, therefore, it was not unairworthy.

Given the conflicting versions of events, the law judge was required to make credibility assessments, and determined that the testimony of the Valley Air Service mechanics was the more credible.[9] Based on their testimony and the documentary evidence of the numerous discrepancies resulting in unairworthiness, the law judge affirmed all the violations alleged by the Administrator. Although respondent argues that the Administrator's mechanic witnesses colluded to build a case against him due to a billing dispute and general dislike, respondent offers no sufficient reason to reverse the law judge's

[9]We agree with the law judge that the diametrically opposed testimony presents classic issues of witness credibility for the law judge to decide, but disagree with any suggestion in the initial decision (see 388-389) that this issue depends only on which witness is most disinterested and least self-serving.

credibility findings.[10] Indeed, there was considerable testimony regarding the relations among the various parties and their possible motives, and the law judge had that testimony before him when he made his credibility findings.

On appeal, respondent also argues that, due to Valley's misunderstanding of the AD, this matter cannot support a finding that the aircraft was unairworthy and that, therefore, the complaint must be dismissed because its only allegation of unairworthiness related to this AD.[11] There are two flaws in this argument. First, Valley's misunderstanding of the AD and the replacing of the side aligning pins rather than the front centering pins does not result in a conclusion (Appeal at 7) that the AD had been complied with. The Valley mechanics both testified that the front cowling pins -- the ones to which the AD actually applied -- were worn. Tr. at 124 and 178.[12] Respondent flew the aircraft on numerous occasions before any pins were changed. The logbook certified noncompliance with the AD. Thus, although the mechanics at Valley were mistaken as to which pins needed replacement to comply with the AD, they were unwittingly correct in certifying noncompliance and their error is harmless

[10]Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

[11]Airworthiness Directive 76-11-02 required that the engine cowling centering pins be replaced if they showed any sign of wear.

[12]Even respondent's mechanic witness confirmed that they were oblong rather than round. Tr. at 282.

for our purposes.

Second, this argument assumes that the AD matter was the only allegation of unairworthiness that could be heard. We disagree. Specifications in the complaint are intended to ensure that respondents receive adequate notice of the matters with which they are charged. Here, the complaint stated:

> 3. As a result of said annual inspection, N52BF was determined to be unairworthy, and you were given a list of discrepancies which included the following unairworthy item: Non-compliance with Airworthiness Directive 76-11-02 in that the engine cowling centering pins were worn beyond acceptable limits.
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> * * * * * *
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> 5. As a result of the discrepancy noted in said annual inspection, N52BF no longer conformed to the type certificate, and it was not in a condition for safe operation.

Although the contrary argument is not without some appeal, on balance we believe that Paragraph 3's reference to a list of discrepancies, especially in light of the entries in the logbooks mentioning other discrepancies, provides sufficient notice that the Administrator was concerned with more aspects of airworthiness than just the AD.

Respondent also argues that Valley did not provide him with the required dated and signed list of discrepancies and, therefore, he cannot be faulted for flying an unairworthy aircraft. Respondent claims that, even assuming he received a copy of Exhibit C-4, it was not a proper discrepancy list but an undated, unsigned checklist. This argument elevates form over substance.

One purpose of the rule requiring the owner of the aircraft to receive a discrepancy list is to ensure he knows the condition of his aircraft so that he can knowingly make decisions regarding whether to fly. This purpose was satisfied, regardless of whether respondent actually was given a written list, and regardless of whether it was dated or signed.[13] In accepting the testimony of the Valley mechanics, the law judge found that respondent was told of the discrepancies. Whether the mechanics complied with rules applicable to them does not control whether respondent violated the rules cited by the Administrator. The issue for us is whether respondent knew or should have known that the aircraft had discrepancies that rendered it unairworthy. The law judge answered that question in the affirmative and respondent offers no facts that warrant changing that conclusion.

[13]Respondent argues, but does not support his contention, that it is "hornbook procedure" to provide a separate discrepancy list. The Administrator countered, at the hearing, that the letter of the regulations was met in combining the checklist with the signed and dated logbook entry.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion to dismiss and appeal are denied; and

2. The 120-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.[14]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.

[14]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).